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(2010) 06 MAD CK 0272

Madras High Court

Case No: A.S. No. 298 of 2000

S.R.C. Industries	APPELLANT
Vs	
The Oriental Insurance Company Limited	RESPONDENT

Date of Decision: June 9, 2010

Acts Referred:

- Constitution of India, 1950 - Article 44
- Limitation Act, 1908 - Section 19
- Partnership Act, 1932 - Section 19, 69

Hon'ble Judges: V. Periya Karuppiah, J

Bench: Single Bench

Advocate: K. Banumathi, for the Appellant; G. Guruswaminathan, for Nageswaran and Narichana, for the Respondent

Final Decision: Dismissed

Judgement

V. Periya Karuppiah, J.
This appeal has been preferred by the Plaintiff against the judgment and decree passed in O.S. No. 3793 of 1996 dated 23.08.1996 by the learned VI Additional Judge, City Civil Court, Chennai.The Plaintiff before the lower Court is the Appellant and the Defendant in the suit is the Respondent herein.

2. The brief facts in the plaint which are necessary for the disposal of the case would be as follows:

2(1). The Plaintiff is an exporter and importer. The Defendant is an Insurance Company dealing in general insurance like fire, marine, etc., The Plaintiff was exporting by sea their handloom and other goods to foreign countries including free Town in West Africa and almost all such shipments were covered under the policy of insurance, insured with the Defendant.

2(2). In respect of a consignment of fifteen bales containing cotton 2/20s yarn in sulphur black colour, each bale containing 100 packets of 2.4 pounds each, totaling 3,600 pounds valued at U.S. Dollar 12,700/-is equivalent to Rs. 1,02,870/-as per invoice No. SRC/Exp/954 of lading issued by INDIAFRICA LINE by their local agents in India intended to be delivered to M/s. Mambolo Store, 40, Little East Street, Free Town, Sierra Leone, the Defendant issued the policy No. 4130/1/772/M/6221 dated 22.04.1981 insuring the goods against all risks. The Plaintiff further states that the foreign buyer M/s. Mambolo Stores, to whom the said goods were intended to be delivered, had the goods examined and found the goods damaged. The foreign buyer M/s. Mambolo Stores had the goods examined by ports Authority and obtained a Survey Report from the Ports Authority showing the damages and made a claim on the Defendant under the said policy and also authorised the Plaintiff herein to receive the amount claimed under the said policy. The claim amount was for fifteen bales of 100 packets each at the rate of U.S. Dollar 650 per packet and thus the claim amount came to U.S. Dollar 9750/-. The said claim was made on the Defendant on 28.06.1982. On 17.07.1982 the said foreign buyer M/s. Mambolo Stores sent all the necessary documents in support of their claim for all the fifteen bales and also requested the Defendant to make a speedy settlement. The Plaintiff followed it up by addressing their letter dated 10.08.1982 to the Defendant asking the Defendant to settle the claim directly with the Plaintiff as per the authority given to the Plaintiff by the said foreign buyer.

2(3) On 09.08.1982, the original survey report together with the photo copies, covering the claim made by the said foreign buyer on the Defendant, were also furnished to the Defendant by the Plaintiff as per the request made by the Defendant.

2(4) In respect of another consignment of Diesel Oil Engine and Rice Huller Spare Parts viz., connecting Rod bearings 2 halves 2 1/2 "" bore No. LD 2-139 numbering 500 pairs and Oil Seal for Grankshaft Main bearing Housing Joint LD 2-127 numbering 500 and covers for Rice Huller numbering 100 and frames for Rice Huller No. 1 numbering 100, the total value of the said goods being 25,700 of U.S. dollars equivalent to Rs. 2,08,427/-Indian money. As per invoice No. SRC/Exp/969, dated 30.04.1981 shipped and as per the bill of lading issued by Indiafrica Line by their local agents in India intended to be delivered to M/s. Mambolo Stores at No. 40, Little East Street, Free Town, Sierra Leone, the Defendant issued the policy No. 4130/1/694 M/6294 dated 30.04.1981 insuring the goods against all risks. The Plaintiff further states that the foreign buyer M/s. Mambolo Stores to whom the said goods were intended to be delivered had the goods examined by its proprietary concern Toufic Huballa & Sons with the help of the Ports Authority and obtained a Survey Report from the Ports Authority showing that the oil cases were empty and made a claim on the Defendant under the said policy and authorised the Plaintiff herein to receive the amount claimed under the said policy. The claim made by the said foreign buyer was for the consignment of eight cases valued at 25,700 of U.S. dollars. The claim was made on the Defendant on 08.06.1982 and the said foreign buyer''s proprietary concern Toufic Huballa & Sons sent all the necessary

documents in support of their claim for all the eight cases of consignment and also requested the Defendant to make a speedy settlement. The Plaintiff had followed it up by addressing their letter dated 28.06.1982 to the Defendant asking the Defendant to settle the claim directly to the Plaintiff as per the authority given by the said foreign buyer.

2(5) On 06.09.1982, the original survey report together with the photo copies covering the claim made by the said foreign buyer on the Defendant were also furnished by the Plaintiff as per the request made by the Defendant.

2(6) The Defendant though promised to settle the claim to the Plaintiff and pay the amount claimed under the aforesaid two insurance policies to the Plaintiff was postponing the settlement of the said claims. Hence the Plaintiff was obliged to send a letter dated 08.06.1985 through their counsel to the Assistant General Manager asking the Defendant to settle the claims arising out of the said insurance policies. The Defendants sent a reply dated 20.07.1985 through their advocates stating that the Defendant was processing the claims which are pending with them and communicated to the Plaintiff that the claims would be processed in the very near future and disposed of subject to the conditions laid down in the policies in question. The Plaintiff waited for more than six months and caused another legal notice dated 28.01.1986 to the Defendant through their advocate calling upon them finally to settle all the pending claims in respect of which the legal notice dated 08.06.1985 was already issued to them. The Plaintiff states that even after the receipt of the said legal notice, the Defendant neither settled the said claims nor sent any reply thereto till date. The Plaintiff is therefore, obliged to file this suit treating the failure of the Defendant to settle the claims even after the receipt of the legal notices for a long time as denial of the Plaintiff''s claims.

2(7) The Plaintiff is also entitled to claim interest by way of damages at the rate of 18% per annum on the amounts payable by the Defendant from 01.08.1983 since the time the Defendant had from the date of lodging the claim till 01.08.1983 is much more reasonable for investigation of claim.

2(8) The Plaintiff states that therefore the claim now due and payable by the Defendant to the Plaintiff is a sum of Rs. 3,11,297/-towards insured value of goods covered under the two policies viz., 4130/1/694/M/6294, dated 30.04.1981 and policty No. 4130/1/772/M/6221, dated 22.04.1981 and a sum of Rs. 1,72,302.80 towards damages by way of interest calculated at 18% per annum of Rs. 3,11,297/-from 01.08.1983 till date, totalling in all Rs. 4,83,599.80 which the Defendant failed and neglected to pay despite repeated demands made by the Plaintiff.

2(9) The Plaintiff therefore, prays for judgment and decree against the Defendant:

i. Directing the Defendant to pay to the Plaintiff the said sum of Rs. 4,83,599.80 together with interest at 18% per annum on Rs. 3,11,297/-from the date of plaint till date of realisation;

ii. Directing the Defendant to pay to the Plaintiff the costs of the suit ;

3. The contentions raised by the Defendant in the written statement are briefly stated as follows:

3(1) The suit claim is barred by limitation. It is submitted that at no point of time this Defendant promised to settle the claim of the Plaintiff as averred in paragraph 8 of the plaint. There was no promise to settle the claim, if any, made by the Plaintiff herein and the Plaintiff is put to strict proof of such averment as made in plaint paragraph 8.

3(2) The policies in question referred to in paragraph 4 of the plaint and paragraph 6 of the plaint were no doubt issued by them. It is learnt that the documents of title were negotiated through bank and endorsed in favour of the respective consignees at Free Town who became the owners of the consignment at all relevant times. It is therefore the endorsees of the policies in question are the persons competent to file and maintain this suit. Therefore the suit filed by the present Plaintiff was without any right, title to the suit consignment at the relevant time and in the absence of any endorsement of the policy in their favour by the consignees, is liable to be dismissed in limine. This Defendant submits that a mere letter of authority to receive payment under any claim cannot empower the present Plaintiff to file and maintain a legal action in a Court of law.

3(3) As far as the claim in respect of cotton yarn as more particularly mentioned in plaint para 4 and covered under the policy No. 4130/1/772/M/6221 dated 22.04.1981 from the documents submitted by the endorsed consignee, it is clear that the consignment in question was shipped and boarded in the Vessel "LA ROCHELLE" at Madras under B.L. No. 53 dated 30.04.1981. The consignment transshipped into vessel "ANASTASIA" arrived at Free Town on 05.07.1981 as evident from the documents submitted by the consignee. Though the consignment was discharged by the vessel which arrived at the port as early as 05.07.1981, examination by the port authority took place only on 23.03.1982 when it was confirmed that the cases were empty. This Defendant submits that such an examination has taken place after a lapse of 8 months or 240 days after the arrival of the vessel at the port of discharge/destination. It is not made clear as to when the consignment was discharged and what was its condition at the time of discharge. Further the owner of the consignment has not established the loss during the currency of the policies. This Defendant submits that under both the policies of insurance referred to herein above, the originals of which are filed in support of the contentions of this Defendant, the said contract of insurance as evidenced in the said policy is subject to the terms and conditions attached thereto and forming part of the policies. Under Institute Cargo Caluse (All Risks) and under Transit Clause (incorporating warehouse to warehouse clause) the insurance attaches as more particularly set out thereunder which is reproduced hereunder.

3(4) This insurance attaches from the time the goods leave the warehouse or place of storage at the place named in policy for the commencement of the transit, continues

during the ordinary course of transit and terminates either on delivery or on the expiry of 60 days after completion of discharge of the goods hereby insured from the over sea vessel at the final port of discharge, whichever shall first occur.

3(5) This insurance shall remain in force (subject to termination as provided for and above the provisions of Clause 2) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transshipment and during any variation of the adventure arising from the exercise of a liberty granted to ship owners or characters under the contract of a freighment.

3(6) Notwithstanding such storage which resulted in termination of transit, even assuming for argument sake, the insured shall be entitled for a period of 60 days as mentioned under Clause (c) of the said clauses. Even then examination of the cargo took place much after the lapse of 60 days and therefore there was no valid cover at the time when the loss ought to have taken place. This Defendant submits that it is the burden of the owner of the consignment to establish the loss during the currency of the policy which burden having not been discharged by the owner of the consignment, the plaint claim is liable to be dismissed.

3(7) This Defendant further submits that under the Bailee Clause, it is the duty of the assured and their agents in all cases to take such measures as may be reasonable for the purpose of awarding or minimising their loss and to ensure that all rights against carriers, bailies or other third parties are properly preserved and exercised. This Defendant submits that evidently the owner of the consignment/ assured failed to comply with this Clause and therefore disentailed themselves from claiming any indemnity under this policy for breach of the said condition.

3(8) It is further submitted by this Defendant that the policy of insurance is also subject to the reasonable despatch clause as found under the Institute Cargo Clauses under which it is a condition of the insurance in question that the assured shall act with reasonable despatch in all circumstances within their control. The assured and / or their assigns / the owner of the consignment failed to act with reasonable despatch inasmuch as there was an inordinate delay in the process of examination of the Cargo in question at the port premises after discharge by the carrying Vehicle.

3(9) The averment in paragraph 11 to the effect that on 20.07.1985, the Defendant sent a reply to the counsel requesting the Plaintiff to wait for the compliance of the demand is erroneous and an act of misinterpretation of the letter of the Defendant''s counsel dated 20.07.1985, wherein it is clearly stated that the said letter was addressed to and all the representations therein are without prejudice to the rights and contentions of the Defendant under law. In the said letter there was no admission of liability or a promise to pay as demanded by the Plaintiff in respect of various claims which were pending at the relevant time.

3(10) The Plaintiff is also not entitled to any amount much less the principal as well as the interest claimed and reflected in paragraph 10 of the plaint. The suit claim being in the nature of damages for breach of contract, it is submitted that no past interest could be claimed and hence it is prayed that such a claim to be rejected.

3(11) This Defendant submits that they are not liable to pay any amount to the Plaintiff herein and therefore pray that this Honourable Court be pleased to dismiss the suit with costs.

4. The lower Court had considered the pleadings and had framed four issues and had examined the Plaintiff"s manager as PW1 and admitted Exs.A1 to A21 on the side of the Plaintiff. No oral evidence nor any documents were produced on the side of the Defendant. The lower Court after appraising the evidence adduced before it had come to the conclusion of dismissing the suit without cost. Aggrieved by the said finding of the lower Court, the Plaintiff has preferred the present appeal.

5. Heard Mrs.K. Banumathi, the learned Counsel for the Appellant/Plaintiff and Mr. Guruswaminathan for M/s. Nageswaran & Narichanay, the learned Counsel for the Respondent/Defendant.

6. On perusal of the pleadings, evidence adduced before the lower Court, the grounds raised in the appeal and on hearing the arguments of both sides, this Court could see the emergence of the following points for consideration:

1. Whether the suit is not maintainable in view of Section 69(2) of the Indian Partnership Act ?

2. Whether the Plaintiff has got due authorisation to file the suit and is the suit maintainable ?

3. Whether the suit is barred by law of limitation ?

4. Whether the Plaintiff is entitled for the suit claim of Rs. 4,83,599.80 with interest at 18% per annum on Rs. 3,11,297/-?

5. Whether the judgment of the lower Court is liable to be set aside and is the appeal allowable ?

6. To what relief the Appellant is entitled for ?

7. The learned Counsel for the Appellant/Plaintiff would submit in her argument that the Plaintiff firm had taken over the assets and liabilities of the erstwhile firm under the deed of dissolution dated 07.11.1983, and as such the Plaintiff is entitled to maintain the suit u/s 69(2) of the Indian Partnership Act and the lower Court was not correct in saying that the liability of the previous partnership firm was not undertaken by the Plaintiff firm which

only came into existence on 07.11.1983. She would further submit in her argument that the certificate of registration, produced by the Plaintiff in Ex.A21, would clearly give the names of the partners which is required u/s 69(2) of the partnership Act. She would further submit in her argument that the Plaintiff''s firm was entitled to maintain the suit as it was continuously registered under the Indian Partnership Act and the requirement u/s 69(2) has been complied with. She would also submit in her argument that the Plaintiff was entitled to claim the damages from the Defendant, stepping into shoes of the buyer, as it had authorised the Plaintiff to receive the amount from the Defendant and therefore, the filing of the suit before the lower Court is maintainable since the buyer was in foreign country and the Plaintiff who acted as the agent of the said principal is entitled to maintain the suit. She would also submit in her argument that the finding of the lower Court that the insurance policies were not assigned to the Plaintiff cannot be a true reason since the authorisation given by the buyer in the foreign country would itself be sufficient to hold that the insurance policies and the rights under the insurance policies were assigned to the Plaintiff. She would also submit in her argument that the transactions had by the Plaintiff with the foreign buyer M/s. Mambolo stores of Free Town Sierra Leone and the said cargo shipped by the Plaintiff to the buyer on two consignments namely cotton yarn in one shipment and diesel engine and other accessories in yet another consignment were damaged and the port of destination had given certificate to that effect to the buyer and in turn it has produced before the Defendant should have been considered and paid to the Plaintiff. She would further submit in her argument the importer who has been admittedly benefitted by the insurance coverage had assigned its right to Plaintiff and therefore, the Plaintiff is entitled to maintain the claim. She would also submit that the damages caused to both the consignments and its value were not disputed and the policy covers the entire transactions and according to the said policy, the authorisation given by the importer / buyer to the Plaintiff would automatically entitle the Plaintiff for the damages caused to the cargos sent to the shipment. She would further submit in her argument that the further finding of the lower Court that the claim was barred by limitation cannot be sustained in view of the fact that the Defendant in its reply in Ex.A18 had admitted that it would consider the claim made by the Plaintiff and therefore, the liability has been acknowledged and from the said date the period of limitation would commence and the suit claim is within time. She would draw the attention of the Court to the contents of Ex.A18, the reply sent by the Defendant. She would bring it to the notice of the Court that the Defendant did not reject the claim in the said letter itself and the reply to the effect that the claim was processed would be amounting to the acknowledgment of liability and therefore, the suit claim should have been considered as within time. She would sum up her arguments on the aforesaid three lines. She would submit that the lower Court had erroneously come to a conclusion that due acknowledgment of the suit regarding the law of limitation and the right of the Plaintiff accrued from the assignment to the letters Ex.A13 and A14 and therefore, the suit claim has to be decreed in favour of the Plaintiff. She would therefore request the Court to set aside the judgment and decree passed by the lower Court and to allow the appeal.

8. The learned Counsel for the Respondent / Defendant would submit in his argument that the Plaintiff has not shown to the Court that the rights and liabilities of the erstwhile firm registered in the same name in the year 1971 had been carried over to the subsequent firm established under Ex.A20 and the evidence is lacking on this point and the legal requirement that document as to the Plaintiff''s partner who is representing the Plaintiff was found to be one of the partners in the registered firm is not produced and the erstwhile partnership firm was different from the present partnership firm, despite the name is the same and therefore, the suit is not maintainable as launched by the Plaintiff. He would draw the attention of the Court, to a judgment of the Hon''ble Apex Court reported in M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, for the principle that the ingredients of Section 69(2) of Indian Partnership Act, has to be strictly construed for deciding the question of maintainability. He would further submit in his argument that the suit has been filed by the Plaintiff for the period of 3 years from the date of right to sue the claim as per Article 44 a(b) and according to the said Article, the suit claim is out of time and therefore, the suit has to be dismissed as done by the lower Court. He would further submit in his argument that the claim should have been made from the date of occurrence or from the date of demand and the same was not made by the Plaintiff. He further submit in his argument that the acknowledgment said to have been given by the Defendant in Ex.A18 is not an acknowledgment attracted u/s 19 of the Limitation Act. The said notice was issued by the Defendant''s counsel to the Plaintiff''s counsel in which it has been categorically mentioned that the Defendant is processing the claim made in Ex.A1 by the Plaintiff through his counsel. He would further submit in his argument that the said reply will not in any way amounting to acknowledgment of liability as contemplated u/s 19 of the Limitation Act. He would draw the attention of the Court, to a judgment of the Hon''ble Apex Court reported in Khan Bahadur Shapoor Fredoom Mazda Vs. Durga Prosad Chamaria and Others, for the principle that there should be some dual relationship with acknowledgment made u/s 19 of the Indian Partnership Act. He would further submit in his argument that the alleged assignment of right by the importer/buyer in favour of the Plaintiff was not for claiming the damages from the Defendant but it was only towards receiving the money on behalf of the importer/buyer at West Africa. He would further submit in his argument that there was no specific authorisation given by the buyer/importer to file the suit or legal proceedings on behalf of the buyer and the Plaintiff who was the Seller-cum-Exporter of the said goods cannot stand as the buyer/importer to claim the damages in the suit to be filed by the buyer/importer.

9. In such circumstances, the Plaintiff cannot act as the agent of the buyer also and to launch a legal proceedings. He would further submit in his argument that the suit claim was also not made in time by the Plaintiff, even though it is not entitled to claim such damages, after the period of 60 days from the date of completion of discharge at the final port of discharge. He would draw the attention of this Court regarding the policy in cargo clause. He would further submit that the consignment was allowed to be stored at the port premises in the warehouse after it reached the port of destination and thereby the transit became terminated and after the lapse of 60 days, the damages have been claimed by

obtaining the survey report. He would insist in his argument that there is no evidence to show at what point the consignments were damaged or lost. Since it was kept in the warehouse of the port of destination, the transit was presumed to have been terminated and it might have lost at the warehouse itself and for that it cannot be deemed as the goods were lost during the currency of policy. He would further submit in his argument that the lower Court thoroughly gone into the facts and circumstances of the case and had rightly come to the conclusion that the suit claim was not made within time and it is barred by limitation and therefore, there is no reason for interference with the judgment passed by the lower Court and therefore, the appeal may be dismissed by confirming the judgment and decree passed by the lower Court.

10. I have given anxious thoughts to the arguments advanced on either side. It is better to apply the arguments of both sides on point wise.

Point No. 1:

The suit was filed by the Plaintiff firm for the recovery of damages on behalf of the importer/buyer from the Defendant. The Plaintiff is a registered partnership firm. According to its constitution it was registered in the year 1971, which was proved and established by production of Ex.A21, the copy of the registration extract, submitted by the Plaintiff. The partnership firm in the same name was in existence from 1971 onwards and during 1981-82, the suit transactions took place and the Plaintiff as the exporter of the suit consignments namely two consignments to the importer M/s. Mambolo stores of Free Town Sierra Leone, West Africa, now claimed as its authorised person for damages for the loss of goods. It is an admitted fact that the said firm was dissolved on 07.11.1983 and re-constituted from the said date. Ex.A20 is the partnership deed executed in between the existing partners. The serious contentions levelled by the Defendant would be that the Plaintiff should have been a registered partnership firm entitled to claim the amount in the suit as per Section 69(2) of the Indian Partnership Act. He would accordingly cite a judgment of the Hon"ble Apex Court reported in M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, in support of his argument.

The relevant passage would occur at para-22 of the judgment would be as follows:

Section 69, Sub-section (2) of the Partnership Act is a penal provision which deprives the Plaintiff of its right to get its case examined on merits by the Court and simultaneously deprives the Court of its jurisdiction to adjudicate on the merits of the controversy between the parties. It will, therefore, have to be strictly construed, once on such construction of this provision the bar u/s 69(2) of the Act gets attracted, then the logical corollary will be that the said provision being mandatory in nature would make the suit incompetent on the very threshold.

11. The Hon"ble Apex Court held that the adherence to the provisions of Section 69(2) of the Indian Partnership Act should be strictly construed. Whether such ingredients of

Section 69(2) was not complied with by the Plaintiff is the question to be decided through evidence. According to Ex.A21, there was a partnership firm in the year 1971 onwards in the same name and the partners to the said firm seek to be partners on various dates and on 07.11.1983, one of the partners died and the said partnership firm was dissolved and there was an endorsement to that effect. Subsequently, the said partnership firm was re-constituted by virtue of the partnership deed executed in Ex.A20 and it was duly informed to the Registrar of Firms and it was filed on 08.12.1983. It could be evidenced in Ex.A21 that the partnership firm, which was registered in the year 1971, is continuing after its re-constitution through Ex.A.20 and it was recorded on 08.12.1983. In the said certificate Ex.A21, the list of partners were mentioned in accordance with Ex.A20. The said partnership firm was represented by Mr. Ravi Prakash and his name is also found in registration certificate. Therefore, the partnership firm, after its dissolution, was re-constituted and since it was recorded by the Registrar of Firms, it is deemed to have been in-existence from its date of registration from the year 1971. The said continuance of name of the partnership firm and its registration would automatically entitle the partnership firm to pursue the right when it was before the dissolution and was also liable to pay its liabilities prior to its dissolution. The lower Court had considered Ex.A20 and had come to a conclusion that there was no provision for rights and liabilities of the partnership firm prior to its dissolution and therefore, the present partnership firm cannot comply with provisions of Section 69(2) of the Indian Partnership Act, which is not sustained. In the aforesaid circumstances, the Plaintiff had complied with the dictum as laid down by the Hon''ble Apex Court and therefore, the suit laid by the Plaintiff is maintainable. Accordingly, this point is decided in favour of the Plaintiff.

Point No. 2:

12. The suit was laid by the Plaintiff and exporter contained 15 bales of cotton yarn valued at Rs. 1,02,870/-to the buyer namely M/s. Mambolo stores of Free town Sierra Leone dated 23.04.1981. The said transaction has been evidenced by the invoice Ex.A2. Similarly on 30.04.1981, the Plaintiff as an exporter had sold rice huller and oil engine spare parts to the same buyer in the foreign countries which could be evidenced through Ex.A7. Both the cargos were despatched through different consignments and were shipped in "La Rochelle" to the port of discharge namely Free town of Sierra Leone a West African Country and the corresponding Bill of Lading was produced as Exs.A3 and A8. The said cargo which were under the shipment were promptly insured by the Plaintiff with the Defendant and the insurance policy is produced as Ex.A9. The said cargo in two consignments had reached the port of destination namely Free town port Sierra Leone of West Africa on 30.12.1981. However, the survey report in respect of both consignments were effected only on 23.03.1982 and 15.05.1982 as evidenced from Exs.A10 and A5. As per the report and the short landing certificate Ex.A11, 8 cases of oil engine were damaged and the oil engines were not found in those cases and they found empty. Subsequently, the buyer in the foreign country namely M/s. Mambolo stores have authorised the Plaintiff through Exs.A13 and A14 in respect of both the consignments for

receiving the amount payable by the Defendant insurance company. The Plaintiff had insured the consignments in respect of 8 cases containing diesel oil engine spare parts and rice huller spare parts numbering 1700 pieces valued at USD 25700, which is evidenced through Ex.A9. As regards the first consignment of cotton yarns, the insurance policy taken by the Plaintiff is produced as Ex.A4. Since both the consignments were damaged or lost during the transit, the importer/buyer of the said consignment of West Africa had given an authority to the Plaintiff to receive the said amount from the insurance company. There is no dispute that the Plaintiff had claimed the said money under the authority given under Exs.A13 and A14 with the Defendant and the Defendant had also considered that the Plaintiff as the agent of the foreign buyer, is entitled to get the damages on behalf of the buyer. When the Plaintiff had come forward with the claim for damages, he has to necessarily prove the said facts through cogent evidence. No doubt he has produced the letter of authority given under Exs.A13 and A14.

13. The serious contentions levelled by the learned Counsel for the Defendant that the Plaintiff cannot sit on the arm chair of the buyer and ask for damages where he had shipped the consignment as seller to the said buyer in both the transactions. As discussed earlier the Defendant had not disputed the status of the Plaintiff in the correspondence had by it in Exs.A15 to A18.

14. In the aforesaid circumstances, the Defendant is estopped from questioning the proprietary of the Plaintiff in claiming the damages on behalf of the foreign buyer M/s. Mambolo stores of Free town Sierra Leone. It was also contended that even if, the Plaintiff is entitled to receive the amount, the suit should have been laid by the said buyer represented through the Plaintiff as his agent and there must be duly an authorisation for launching a suit against the Defendant in the Court of law. This contention levelled by the Defendant is also not sustainable, since the damages which have been accrued by virtue of loss of goods in transit was authorised by the buyer to the Plaintiff and it was not disputed by the Defendant by virtue of several transactions had by it through Exs.A15 to A18. The said assignment given by the foreign buyer in favour of the Plaintiff would entitle him to lay a claim in the Court of law for its own benefit. Further, Exs.A13 and A14 the authorisation letters would go to show that the damages payable to the foreign buyer M/s. Mambollo stores have to be given to the Plaintiff for the dues payable by the said foreign buyer. Therefore, the Plaintiff can maintain the suit as against the Defendant stepping into the shoes of the foreign buyer namely, M/s. Mambolo stores of Free town Sierra Leone. Accordingly, this point is also decided in favour of the Plaintiff.

Point Nos. 3 & 4:

15. It has been categorically contended by the learned Counsel for the Defendant that the claim was barred by limitation and even if it is found within the period of limitation, the Plaintiff has not proved that the damages were caused to both the consignments during the currency of the insurance coverage. He would draw the attention of the Court to the dates of claim made by the Plaintiff and the dates of cause of action and the actual

survey reports given by the port of destination. According to the Defendant"s case, the suit has to be launched within 3 years from the date of occurrence or from the date of demand under Article 44(b) of the limitation Act and the suit has not been filed within such time. The relevant Article runs as follows:

44(b). The date of occurrence causing the loss, or where the claim on the policy is denied, either partly or wholly, the date of such denial.

The date of occurrence would be from 30.05.1981, when the shipment reached the port of destination and thereafter, on 23.03.1982, when the short landing of second consignment containing the spare parts of oil engine and rice huller numbering 1700 pieces were not found conveyed. As regards the first consignment of cotton yarn, the survey report was prepared only on 15.05.1982. Therefore, as per the said dates of cause of action for both the consignments, the period of limitation would be either 23.03.1985 or 15.05.1985. However, the Plaintiff has claimed through documents and it was replied by the Defendant counsel in Ex.A18 and the said claim of the Plaintiff was not denied. According to the submission made by the Defendant counsel, the Defendant had replied in the said letter that it would consider the claim made by the Plaintiff. The ingredients of the said letter would not amount to any denial or any acknowledgment of the liability. In the aforesaid circumstances, the limitation period for the suit claim which has been commenced from the date of occurrence is over by the said date and contents of Ex.A18 would not amount to any acknowledgment made by the Defendant in favour of the Plaintiff and therefore, there cannot be any extension of limitation for the liability arising out of Ex.A10 and A5, the survey report of both the consignments. The documents filed by the Plaintiff would not disclose that the Defendant had refused the claim prior to the date of the suit. Therefore, there cannot be any cause of action on the basis of denial of the Plaintiffs claim. In the aforesaid circumstances, this Court can easily come to a conclusion that the Plaintiff"s claim for both consignments have been barred by law of limitation.

16. Even otherwise, when we go into the question of the entitlement of suit claim, despite limitation, the contention of the Defendant would be that the period in between the date of arrival of the consignments to the port of destination is more than 60 days as contemplated in the insurance policy in the institute-clause and even according to the said rules, the damages cannot be claimed by the Plaintiff or his principal, the foreign buyer as per the policy condition. He would draw the attention of the Court to the rules in Ex.A4 and A9, the insurance policies. As per the evidence available through the documents, the information of damages was not informed to the consignee within 60 days as evidenced from Ex.A5 and A10 and the rules in risk-clause in Ex.A4 and A9 are applicable. Accordingly, the cargos were found to be in warehouse of the port of destination in those period and it cannot be denied that during the said time the consigned cargos could have been damaged. Therefore, as per the rules attached in Exs.A4 and A9 the claim was made after the expiry of 60 days of completion of discharge of the cargos insured from the overseas vessel at the final port of discharge and

therefore, it would not come under the currency period of the insurance policy.

17. The claim made by the Plaintiff was purely based upon the survey reports in Exs.A5 and A10 and there is no dispute regarding the quantum of damages. However, in view of the absence of proof on the side of the Plaintiff that the damages were caused exclusively during the time of transit, the Plaintiff cannot be awarded with the damages as sought for.

18. In view of the bar of the claim due to the law of limitation and also the rules of the insurance policy as stated above, the claim made by the Plaintiff cannot be afforded. The claim for interest made by the Plaintiff will also follow the same and accordingly, these two points are decided against the Plaintiff.

Point No. 5:

19. In view of findings reached in above points, the Plaintiff is entitled to maintain the suit and the suit filed by the Plaintiff is maintainable u/s 69(2) of Indian Partnership Act, but however, the suit claim is not sustainable and the suit claim even if sustainable, is barred by law of limitation, there is no other option for this Court except to dismiss the suit on that aspect. Accordingly, the findings of the lower Court in respect of the maintainability and sustainability under Indian Partnership Act are set aside and other findings of the lower Court are confirmed and therefore, the dismissal of the suit before the lower Court is hereby confirmed. Accordingly, the appeal is liable to be dismissed.

This point is also decided against the Appellant/Plaintiff.

Point No. 6:

20. In view of my findings reached in the aforesaid points, despite the reversal of the findings of the lower Court on maintainability issue but on confirming the other issues, the appeal is dismissed by modifying the findings of the lower Court. In the peculiar circumstances of the case, there shall be no order as to costs in this appeal.